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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ESTEBAN JIMENEZ,

Defendant and Appellant.

E062064

(Super.Ct.No. FSB1401357)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Esteban Jimenez, of one count of transporting a controlled substance (Health & Saf. Code § 11379, subd. (a), count 1) and found true the allegation that the substance contained methamphetamine exceeding four kilograms (Health & Saf. Code § 11370.4, subd. (b)(1), (b)(2)).¹

The trial court sentenced defendant to a total term of eight years in local prison by imposing a three-year midterm on count 1, with a consecutive five-year enhancement on the four-kilogram weight allegation.²

On appeal, defendant argues the trial court erred to his prejudice by failing to instruct the jury that two witnesses were accomplices as a matter of law, and that their testimony required corroboration. We disagree and affirm the judgment.

FACTUAL BACKGROUND

On the afternoon of March 20, 2014, officers from the San Bernardino and Redlands Police Departments were conducting joint surveillance on a red Toyota Camry. An officer in a surveillance plane observed the Camry as it drove from Fontana to a residence in San Bernardino. The officer observed the Camry stop near a carport on the residence property as two people got out of the car, retrieved an object from the trunk, and carried it underneath the carport. The officer later observed the Camry leaving.

¹ Defendant was charged also with possessing methamphetamine with intent to sell. (Health & Saf. Code § 11378.) The jury failed to reach a verdict on that count, and the trial court declared a mistrial on it.

² The trial court also imposed a three-year enhancement for the lesser included one-kilogram weight allegation, but stayed execution.

Another officer in an unmarked car also was following the Camry as it drove from Fontana to the residence in San Bernardino. The officer observed that defendant was driving the Camry. After the Camry left the San Bernardino residence, the officer continued to follow, and observed defendant checking his rear mirrors often, making a sudden exit from the highway, and driving below the speed limit. The officer thought defendant was driving in a manner suggesting counter-surveillance. Defendant turned the Camry into a parking lot for about three seconds and then left as the officer continued to follow.

Shortly after defendant exited the parking lot, two other officers in a marked patrol car pulled over defendant for driving with an obstructed view. The officer in the unmarked car pulled up and took over investigating for the other two officers after they had removed defendant and the other occupant from the Camry. The officer found four “pay as you go” cell phones in the Camry. The officer searched the person of the Camry’s other occupant and found a set of keys. When asked about his relationship with the occupant, defendant said the occupant was a friend he had known for a few years, but defendant could not remember the occupant’s name. Defendant also denied having been present at the San Bernardino residence. Defendant did not have a valid driver’s license; he had a fraudulent green card and social security card, and he was taken into custody.

Meanwhile, other officers on the joint surveillance team contacted the husband and wife who lived at the San Bernardino residence, securing the property in anticipation of a search warrant. An officer asked the husband if there were any illegal narcotics or

contraband on the property. The husband said he wanted to “be honest” with the officer, and the husband led the officer to the carport at the rear of the residence. The husband pointed to two toolboxes in a corner of the carport and told the officer that “two Hispanic males” in a “red Toyota Camry” whom he “did not” know had left the toolboxes. One toolbox was empty, but the other contained, in Ziplock baggies, what later proved to be about 9.4 pounds of crystal methamphetamine. The officer asked the husband if he knew where the two Hispanic males in the red Toyota Camry lived. The husband led the officer and his sergeant to a residence in Muscoy a few minutes away. The Muscoy residence had a large driveway gate that was closed and locked. The sergeant, who had heard that defendant and the other occupant of the Camry were detained, asked over the radio whether either of them had a set of keys. The keys recovered from the other occupant of the Camry were brought to the Muscoy residence; they unlocked the gate to the driveway. In a shed on the property, Ziplock baggies and a Tupperware container were found; the container and some of the baggies had a “white . . . residue” that a presumptive kit test indicated was methamphetamine.

At trial, the wife testified that, while the husband was gone to pick up a part to repair his car, she saw, from inside the house, two men she did not recognize park at the San Bernardino property in a “blue truck”; get out of the truck; and carry a toolbox to the rear of the property. The wife assumed they were going to “fix something” because her husband worked as a mechanic. About five or 10 minutes later, a “red car” also parked at the property and then left “very quick,” before the wife could see who had been inside.

The wife did not say anything to the husband about either the truck, the Camry, or the toolboxes until after the officers arrived and filed a police report.

The husband testified that he was home at the San Bernardino property when both the blue truck and the red Camry were there. The husband testified he saw two “Mexican” guys in the red Camry, one of whom he identified in court as defendant. The husband denied knowing that the toolbox with methamphetamine in it “existed,” and he denied leading any officers to it in the carport on the residence property. The husband also denied telling officers that defendant and the other occupant of the Camry left the toolboxes there.

The People offered narcotics officer opinion testimony that defendant was a “mule” tasked with transporting narcotics from one place to another without being detected.

In relevant part, the trial court instructed the jury according to CALCRIM No. 334 (Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice), which provides that, if the jury decides a witness is an accomplice of a defendant, then they should view “with caution” any testimony from that witness tending to incriminate the defendant, and reject the testimony if they find it is not independently supported by credible, corroborating evidence.

DISCUSSION

On appeal, defendant argues the husband and wife indisputably were accomplices, and that the trial court prejudicially erred by instructing the jury according to CALCRIM

No. 334 instead of CALCRIM No. 335 (Accomplice Testimony: No Dispute Whether Witness Is Accomplice), which would have “defined” the husband and wife as “accomplices as a matter of law” and would have resulted automatically in an admonishment to the jury to weigh their testimony “with caution.” We disagree.

“A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.” (Pen. Code § 1111.) An accomplice is “one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (*Ibid.*) “When an accomplice is called as a witness by the prosecution, the court must instruct the jurors sua sponte to distrust his testimony.” (*People v. Guian* (1998) 18 Cal.4th 558, 564, citing and quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1314.) To be considered liable for prosecution for an identical offense, the evidence of a witness’s criminal culpability must be “so clear and undisputed” that only a “single inference could be drawn,” namely, that the witness would be liable for the same offense charged against the defendant. (*People v. Williams* (1997) 16 Cal.4th 635, 680.) A trial court’s failure to instruct the jury properly on accomplice testimony “is harmless if there is sufficient corroborating evidence in the record,” and such “ ‘[c]orroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense,’ ” provided it “ ‘tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’ ” (*People v. Lewis* (2001) 26

Cal.4th 334, 370, citing and quoting cases for these propositions; see *People v. Gonzalez and Soliz* (2011) 52 Cal.4th 254, 303, citing and quoting *Lewis* and the same cases on which it relied.) Presence at the scene of the charged crime and intimate knowledge of the charged crime are not by themselves sufficient facts to decide that a witness is an accomplice as a matter of law (*Lewis*, at p. 369); only when the facts with respect to the participation of a witness in the charged crime are “ ‘ “not disputed” ’ ” may a trial court determine the witness is an accomplice as a matter of law. (*Ibid.*)

Here, the record reveals that both the husband and the wife denied knowing the defendant, and that they denied knowing the toolbox found in their carport contained methamphetamine. Although it may have been a weak inference for the jury to draw in light of the circumstances presented at trial, the jury was nevertheless permitted to infer from these protests that the husband and wife did *not* have any involvement in, or knowledge of, the offense. Moreover, the record does not reveal that either the husband or the wife either had transported, or were at the time transporting, a controlled substance. Accordingly, the trial court properly left it to the jury to decide whether the husband and wife were accomplices of defendant.

Even assuming in defendant’s favor that the husband and wife *were* his accomplices as a matter of law, the officer conducting aerial surveillance observed a red Toyota Camry drive onto the San Bernardino residence property, and he observed two occupants get out of the vehicle, go to the trunk, and then go under the carport. Ground surveillance identified defendant as the driver of the Camry. Defendant was observed

driving in a manner that suggested avoiding detection and shaking any followers. The methamphetamine found in the toolbox was contained in Ziplock baggies, and Ziplock baggies were found at the Muscoy residence with a white residue that a presumptive test indicated was methamphetamine. The keys found on the Camry's other occupant unlocked the gate to the Muscoy property. All of these circumstances provided independent corroborating evidence that would render harmless any instructional error regarding how the jury should have weighed any accomplice testimony.

Defendant contends the instructional error was prejudicial, because only the husband's statements to the police "tie[d] the actual [tool]box" to defendant and led to police to the Muscoy property, where similar packing materials were found; the wife's statements suggested the toolbox had been left by defendant; and no direct evidence except for the husband's and wife's statements tied defendant to the red Camry. Defendant also contends the People conceded that the husband was an accomplice.

As to what defendant characterizes as the People's concession that the husband was an accomplice, the statement defendant points to was made during closing arguments, and nothing said in closing arguments is either evidence or binding on the jury. (E.g., *People v. Stitely* (2005) 35 Cal.4th 514, 559.) Thus, whether the husband was an accomplice was still an open question for the jury to decide. Moreover, under the trial court's instructions, the jury *still* was entitled to draw the inference that the husband was an accomplice. As to defendant's contentions that only the husband's and wife's statements incriminated him, as our discussion above illustrates, assuming there was

error, there was enough independent corroborating circumstantial evidence presented to the jury to preclude *prejudicial* error; indeed, such evidence need only be “slight,” and the evidence here passed that low threshold. (*People v. Lewis, supra*, 26 Cal.4th at p. 370.)

In sum, the record reveals that the trial court properly instructed the jury regarding any accomplice testimony it may have heard, and that sufficient independent corroborating evidence connected defendant with the crime of transporting methamphetamine to lend credence to those portions of the husband’s and wife’s testimony the jury may have chosen to believe.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.